PD-0672-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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COURT OF CRIMINAL APPEALS NO. PD-0672-17
NINTH COURT OF APPEALS NO. 09-15-00196-CR
356TH DISTRICT COURT TRIAL COURT NO. 23010

FILED
COURT OF CRIMINAL APPEALS
11/9/2017
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In the
TEXAS COURT OF CRIMINAL APPEALS
in
AUSTIN, TEXAS

CRYSTAL LUMMAS BOYETT
v.
THE STATE OF TEXAS

Petitioner's Brief in Support of Discretionary Review

Trial Court: 356th Judicial District Court (Hardin County) / The Honorable Steve Thomas
Petitioner: James P. Spencer II (Crystal Lummas Boyett's Attorney)
Respondent: State of Texas (Represented by the Hardin County District Attorney)

JAMES P. SPENCER, II
State Bar No. 17365980
Law Offices of James P. Spencer, II
5023 FM 1632
Woodville, Texas 75979
409/ 549-6400
409/ 837-9779 FAX

ATTORNEY FOR PETITIONER

ORAL ARGUEMENT REQUESTED AND GRANTED

IDENTITY of PARTIES and COUNSEL

Petitioner:

CRYSTAL LUMMAS BOYETT

Respondent:

THE STATE OF TEXAS

Appellate Counsel for Petitioner:

JAMES P. SPENCER, II
State Bar No. 17365980
Law Offices of James P. Spencer, II
5023 FM 1632
Woodville, Texas 75979
409/ 549-6400
409/ 837-9779 FAX

Trial Counsel for Petitioner:

Glen M. Crocker
State Bar No. 24001445
3535 Calder Ave., 3rd Floor
Beaumont, Texas 77706
409/833-4277
409/833-4366 FAX

Appellate Counsel for Respondent:

Sue Korioth, P.C. (Special Prosecutor Assisting the Hardin County DA)
State Bar No. 11691975
P.O. Box 600103
Dallas, Texas 75360
214/384-3864
suekorioth@aol.com

Trial Counsel for Respondent

David Sheffield (District Attorney)
State Bar No. 18181000
Bruce Hoffer (First Assistant District Attorney)
State Bar No. 09778500
Kendra Walters (Assistant District Attorney)
State Bar No. 24077801
District Attorney of Hardin County
P. O. Box 1409
Kountze, TX 77625
409/246-5160
409/246-5142 FAX

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STATE CASES:

STATE STATUTES and RULES:

STATEMENT of the CASE

Nature of the Case:	This is a manslaughter conviction arising from a vehicular accident with two (2) deaths and an injury.
Trial Court:	The Honorable Steve Thomas, 356th Judicial District Court, Hardin County, after trial a jury entered a verdict of guilty and accessed the maximum sentence of twenty (20) years.
Court of Appeals:	Ninth Court of Appeals, Beaumont, Texas.
Parties in the Court of Appeals:	Appellant[s]: Crystal Lummas Boyett Appellee[s]: State of Texas
Disposition:	Justice Kreger authored the court's opinion, joined by Justices McKeithen and Horton. The court of appeals affirmed the judgment below. No motions for rehearing were filed.
Status of Opinion:	Justice Kreger noted "Do Not Publish" on the opinion.

STATEMENT of the JURISDICTION

This Court has jurisdiction pursuant to section 68.1 of the Texas Rules of Appellate Procedure.

STATEMENT of ORAL ARGUMENT

Oral Argument was requested by the Petitioner in the event the Court needed further information in making a decision in this case. Oral Argument was granted by this Court as to Point One in the Petitioner's Request for Discretionary Review.

STATEMENT of the PROCEDURAL HISTORY

This case was submitted on June 16, 2016. The Ninth Court of Appeals delivered its opinion on May 31, 2017. No motion for rehearing was filed in this case. The Appellant filed a Petition for Discretionary Review on 7/8/2017. This Court granted Appellant's Petition for Discretionary Review in this case on 10/18/2017. The Court is granting Review/Oral Argument on Ground One in the Petition for Discretionary Review.

STATEMENT of the FACTS

For ease of reference, the following facts can be found generally in the Court Reporter’s transcript Volume 7, Page 11, Line 17 through Page 17, Line 20.

On or about February 3, 2014, the victims of the accident were involved in a motor vehicle collision. The victims were all members of the same family, Dawn Sterling (mother), Connely Burns (older daughter) and Courtney Sterling (younger daughter). This case involves the manslaughter death of Connely Burns. Dawn Sterling was the only survivor of the accident except for the Appellant. Mrs

Sterling does not remember the accident. The Appellant drove a red Camero and the victims were in a white Nissan Murano (Courtney Sterling was the driver).

Several law enforcement officers testified that they sighted a red Camero traveling southbound on Highway 62 (South of Buna nearing Lumberton) and radar indicated the speed was over 150 mph. Some of the officers attempted an intercept but due to the speed and department regulations involving high speed pursuits, they were unable to catch up to the red Camero. The vehicle drove through the main street of Lumberton (Hwy 62) and approached the Hwy 62 / Hwy 96 "Y" (split). After the red Camero merged onto Hwy 96, it impacted the rear of the Nissan Murano. The driver (Courtney Sterling) was mortally wounded and died at the hospital, Connely Burns was killed on impact and Dawn Sterling was seriously injured but survived. The Appellant survived with non-life threatening injuries.

The Court conducted a hearing for a Continuance on March 31, 2015 based on the failure of the State to provide a litany of discovery materials. The Court refused to grant the continuance after a hearing. On April 15, 2015, the Appellant filed a formal motion for a continuance (again complaining of late discovery conducted by the State), which was denied without a hearing. The Appellants case began trial on April 20, 2015, Appellant was tried by a jury for Manslaughter and found guilty. During the Trial, the Appellant became unable to either aid her

attorney or understand the case against her. Appellants attorney requested a competency hearing and an examination by a trained professional, a hearing was granted but the examination request was denied. Appellants attorney refused to let the Appellant take the stand in her own defense due to his belief that the Appellant was incompetent at that time. Appellant was unable to put on any witnesses due to the incompetency of the Appellant preventing her participation in preparing her case. Appellant was tried by a jury for Manslaughter and found guilty. Appellant was assessed the maximum punishment of twenty years in Texas Department of Corrections - Institutional Division.

This case was appealed to the Ninth Court of Appeals (Beaumont) and a three judge panel affirmed the lower court's decision in its memorandum. This appeal arises from that memorandum.

ISSUES FOR REVIEW

Issue 1: The court's competency examination ruling.

The court of appeals erred in affirming the trial court's judgment because the evidence presented at trial was sufficient to satisfy the statutory standard of "some evidence" necessary to require a "formal competency hearing."

SUMMARY OF THE ARGUMENT

The Court of Appeals misapplied the case law cited in their memorandum opinion to find less than some evidence of the Appellant's incompetence.

Additionally, the Court dismissed each part of the Appellant's evidence as independently insufficient to show some evidence of incompetency and failed to look at the Appellant's evidence cumulatively.

ARGUEMENT

Argument 1: The prior appellate court's competency examination ruling is incorrect.

"On suggestion that the defendant may be incompetent to stand trial, the court shall determine by informal inquiry whether there is **some evidence** from **any source** that would support a finding that the defendant may be incompetent to stand trial." See **Texas Code of Criminal Procedure Sec. 46B.004(c)** [emphasis added].

The Court of Appeals cited to three (3) cases in their analysis on the denial of a formal competency hearing. These cases were **Turner v State**, 422 S.W.3d (Tex. Crim. App. 2014), **Ross v State**, 133 S.W.3d 618 (Tex. Crim. App. 2004) and **McDaniel v State**, 98 S.W.3d 704 (Tex. Crim. App. 2003).

In **Turner** and **McDaniel**, the Court did order formal competency hearings which resulted in a competency finding in both those cases. Thus, those cases can be distinguished, from this case, in that there was a formal competency hearing

where the Defendant was found competent, contemporaneously with the trial, in the Courts record.

In **Turner**, after two prior formal competency hearings finding the Defendant competent, this Court still found that the Defendant was entitled to a third formal competency hearing. Stating that "bearing firmly in mind that the standard for requiring a formal competency trial is not a particularly onerous one - whether, putting aside the evidence of competency, there is more than a scintilla of evidence that would support a rational finding of fact that the accused is incompetent to stand trial." See **Turner** at 696. Additionally in **Turner**, this Court stated "especially when there has been a suggestion of incompetency but no formal adjudication of the issue, due process requires the trial court to remain ever vigilant for changes in circumstances that would make a formal adjudication appropriate." See **Turner** at 693.

In **McDaniel**, the Defendant asked to represent himself at his probation revocation hearing and presented a well thought out defense of his revocation allegations. See **McDaniel** at 706-708. However, even in this case the Court decided to grant a formal competency examination between the hearing and sentencing dates (i.e. the Defendant was found competent at this hearing). See **McDaniel** at 708.

In **McDaniel**, the Court noted "reliable evidence of incompetency could be in the form of the defendant's attorney orally reciting 'the specific problems he has had in communicating with his client.'" See **McDaniel** at 710-711 and n.19.

In **Ross**, the Defendant underwent a *seven week* trial and there is actually testimony in the record indicating that the Court was present and had "seen interaction on every day, on a daily basis, multiple times a day, his interaction with him and his lawyers." See **Ross** at 626-627 The Defendant, in **Ross**, was able to articulate to the Court that he did not want a competency examination and offered to "address the Court" on that matter. **Ross** at 627. The trial court in **Ross** relied on its "personal observations of appellant *over several weeks*" to determine that competency existed. See **Ross** at 627.

As stated in the Appellant's Original Brief:

During the trial, the Appellant's attorney filed a motion raising the issue of competency of the Appellant. (Clerks record page 76 to 79). The Court dismissed the Jury and held an informal hearing on the validity of the motion. (Transcript Vol. 9, page 12, line 3 to page 63, line 17).

The State based much of its case on the mental state of the Appellant, portraying her as cold and unfeeling, thus the State initially called into question the mental condition of the Appellant. (Transcript Vol. 7, page 17, line 21 to line 24; Vol. 8, page 76, line 2 to line 6; Vol. 8 page 83, line 17 to page 84, line 7; Vol. 8,

page 86, line 21 to line 22; Vol. 8, page 91, line 6 to line 16). The States witnesses testified that the Appellant was taking medication for "severe bi-polar disorder." (Transcript Vol. 8, page 75, line 22 to page 76, line 6). No medications were found in the Appellant's system except for the Xanex. (Transcript Vol. 8, page 74, line 18 to line 22). Indicating that the other medications prescribed for her mental condition were not in her system (Transcript Vol.9, page 19, line 4 to line 10), in other words she was medically non-compliant at the time of the accident. Continued medical non-compliance is a possible cause of the Appellant's incompetency at the time of trial.

The Appellant called Jennifer Dornbos as its first witness to prove incompetence. (Transcript Vol. 9, page 13, line 14 to page 14, line 6). Mrs. Dornbos stated her background qualifications to testify as a witness to the Appellant's incompetence as follows:

> **Dornbos**: "I have seven degrees. I have been in practice for 17 years for Curt Wills as his psychological associate doing psychological testing, assessments, jury selection and competency issues."
> (Transcript Vol. 9, page 14, line 9 to line 12).
>
> AND
>
> **Attorney:** "To the best of your ability, how many competency issues do you think you have handled or been a part of?"
> **Dornbos:** "That's hard to tell over the years."
> **Attorney:** "This isn't your first one?"

> **Dornbos:** "No, sir, it's not. Basically, all my reports, you know, go to competency. And then we do the psychological evaluations, and my reports are sent forth to the Judge."
> (Transcript Vol. 9, page 20, line 10 to line 17).

The witness actually does the kind of testing the Court would request and appoint out to a physicians office to prepare a report for a formal competency/commitment hearing. Mrs. Dornbos was helping prepare the Appellant for her testimony the following day. (Transcript Vol. 9, page 14, line 16 to page 16, line 8). Mrs. Dornbos stated she believed the Appellant was "divorced from reality." (Transcript Vol. 9, page 17, line 4 to line 17). She based this on her observations of the Appellant, the Appellants family's observations of the Appellant and the Appellants prior mental history. (Transcript Vol. 9, page 16, line 12 to page 20, line 9). Mrs. Dornbos further stated specific facts and observations that helped her form an opinion that the competency motion was valid and not frivolous:

> **Dornbos:** "I cannot be totally certain if there was an absence or presence of psychosis, but the behavior was extremely extraneous. And knowing the history that she has hallucinations and delusions and she is schizophrenic and bipolar, that does not help the issue of competency."
> (Transcript Vol. 9, page 15, line 3 to line 7).

AND

> **Dornbos:** "Usually in court cases, we will give a Defendant a notepad and paper which -- they can ask their attorneys, or the prosecutors even, questions in trial.

And there is -- the only questions in that notebook are those that I asked her. She has doodles and hearts. And there was some lengthy, you know, sentences that were loosely connected and really absent of any sense, basically."
(Transcript Vol. 9, page 15, line 12 to line 18).

AND

Attorney: "These ramblings that you saw in the notebook were after the conclusion of the proceedings yesterday; is that correct?"
Dornbos: "Yes, sir."
(Transcript Vol. 9, page 16, line 5 to line 8).

AND

Attorney: "Knowing that she has a history of bipolar schizophrenia, is it possible she is becoming episodic?"
Dornbos: "I would say, yes. The fact that she disassociates and has no insight is a huge concern"
(Transcript Vol. 9, page 16, line 12 to line 15).

AND

[while Appellant was speaking with expert witness]
Attorney: "When the expert was speaking with her, was he using hyper-technical jargon that a layperson would not understand?"
Dornbos: "No, sir. He was using lay terms that anyone would be able to understand."
Attorney: "In fact, he was -- not only was he speaking, he was illustrating it through forms of, like props, correct?"
Dornbos: "Yes, sir."
Attorney: "Anybody could understand that, in your opinion?
Dornbos: "Yes, sir."
Attorney: "What was Ms, Boyett's affect during that point in time?"

Dornbos: "Very flat affect and -- it wasn't as if she had any factual understandings of what was being told to her."
Attorney: "Its almost as if -- I don't want to put words in your mouth -- it went in one ear and out the other?"
Dornbos: "Basically, yes."
Attorney: "Do you feel like at this point in time she appreciates the gravity of the situation?"
Dornbos: "No, sir, I don't."
Attorney: "In fact, you were present during two different conversations on two separate days; and she didn't recollect the conversation from the day prior; is that accurate?"
Dornbos: "Very accurate."
Attorney: "Almost as if that is the first time she has heard it?"
Dornbos: "Yes."
(Transcript Vol. 9, page 17, line 18 to page 18, line 21).

AND

Attorney: "What are the mediations she [Appellant] is supposed to be taking?"
Dornbos: "Lithium. She is on Geodon for bipolar -- both are psychotropics for schizophrenia and bipolar. She is on two medications for thyroid and Hashimoto's. And she is on -- she was on Valium, but the doctor changed he prescription from Valium -- I mean Xanex to Valium."
(Transcript Vol. 9, page 19, line 4 to line 10).

AND

Attorney: "Do you believe that she [Appellant] has a sufficient present ability to consult with me [Appellant's attorney] within a reasonable degree of rational understanding?"
Dornbos: "No, sir."
(Transcript Vol. 9, page 19, line 11 to line 14).

AND

> **Attorney:** "In your estimation, is this filing of a request and suggestion frivolous?"
> **Dornbos:** "No, sir."
> (Transcript Vol. 9, page 20, line 18 to line 20).

AND

> **Dornbos:** "[Regarding Appellant's trial notes] And it was -- there was -- it was all tangential which is another symptom of schizophrenia and bipolarism. You know, they can't put thoughts together; and they are very delusional thoughts. And, you know, we were every -- all concerned about what we saw in this notebook."
> (Transcript Vol. 9, page 46, line 17 to line 21).

When the State cross-examined Mrs. Dornbos, it was revealed that the Appellant had developed a "tic", which Mrs. Dornbos adamantly related to the Appellant's "schizophrenic" diagnosis, despite repeated attempts by the State to reclassify the "tic" as merely a sign of disgust. (Transcript Vol. 9, page 34, line 10 to page 36, line 13). The witness stated that the "tic" worsened as time progressed and Mrs. Dornbos was convinced that it was a manifestation of the schizophrenia based on her experience. (Transcript Vol. 9, page 35, line 1 to page 36, line 10). The witness observed the Appellant's further detachment from reality, in that the Appellant was "delusional" about the attitude of the jury and the sentence. (Transcript Vol. 9, page 37, line 4 to page 38 line 16). Despite the States cross-examination, the witness was adamant that the Appellant was not able to assist in her own defense. (Transcript Vol. 9, page 37, line 2 to line 3). The witness stated

her understanding of competency and explained why she believed the Appellant was experiencing a schizophrenic episode due to possible medical non-compliance. (Transcript Vol. 9, page 38, line 25 to page 39 line 19). The witness consulted with the Appellant's family about the Appellant's behavior and prior mental health incidents. (Transcript Vol. 9, page 39, line 23 to page 40 line 15). Additionally, this witness was NOT HIRED/PAID by the Appellant for her assessment of the Appellant's competency; she volunteered to stay on at no fee after the jury selection. (Transcript Vol. 9, page 40, line 16 to page 40 line 24).

The second witness called by the Appellant was the Appellant's accident reconstruction expert, James Paul Evans. (Transcript Vol. 9, page 21, line 5 to line 14). Mr. Evans testified as to his inability to communicate and get information from the Appellant sufficiently to prepare for Court. (Transcript Vol. 9, page 21, line 24 to page 24 line 13). He explained that he was not able to interact with the Appellant in any rational way. (Transcript Vol. 9, page 23, line 1 to line 24). The State tried to classify the Appellant's inability to work with the accident constructionist as "not caring" about her case but the witness explained it more as "[she's] not getting it", "it's not clicking" or "denying basic things." (Transcript Vol. 9, page 47, line 10 to page 54 line 10). This caused harm to the Appellant in that the expert was not able to discuss the case with the Appellant with sufficient

rational understanding to prepare for either his or her testimony the next day. This resulted in the loss of testimony for two witnesses for the Appellant's defense.

The Appellant's third witness was Charlotte Bush, the Appellant's sister. (Transcript Vol. 9, page 25, line 10 to line 17). She re-confirmed her sister's diagnosis of "bipolar and schizophrenic and depression." (Transcript Vol. 9, page 27, line 15 to line 20). She also confirmed that the Appellant was supposed to be on medication but could not confirm whether the Appellant was medically compliant. (Transcript Vol. 9, page 27, line 21 to page 28 line 4). The witness is familiar with the Appellants behavior and believes that at the time of this hearing, the Appellant is incompetent. (Transcript Vol. 9, page 28, line 5 to line 19). The witness also stated that the Appellant had to be hospitalized for her mental condition (bipolar schizophrenia) in late 2013. (Transcript Vol. 9, page 28, line 20 to page 29 line 3). The witness related that the Appellant's current behavior is similar to her past behavior which necessitated the 2013 hospitalization. (Transcript Vol. 9, page 29, line 4 to line 12). During the State's cross-examination of Mrs. Bush, the witness stated that the Appellant "did not understand the seriousness of the trial." (Transcript Vol. 9, page 56, line 13 to page 57 line 4). The witness described the behavior of the Appellant when she is having an "episode" as:

> **Attorney:** "When you said that she's maybe going through some stage of an episode, what did you mean?"

Bush: "She's back in the beginning stages of --"
Attorney: " I'm sorry?"
Bush: "Back in the Beginning stages of schizophrenia."
Attorney: "Well, what do you mean by that?"
Bush: "Where she -- she gets very agitated, very hostile with it."
Attorney: "What does that mean? By doing what?"
Bush: "She gets fidgety and ignores. She will retreat into herself and not want to speak with nobody, not want to deal with anybody, not want to -- and I don't know what the long-term effects of that would be, whether she would be a danger to herself."
Attorney: "Well what do you mean when she said -- when you said she exhibits a lot of anger? What does she do to exhibit anger?"
Bush: "She internalizes and she will start talking to herself and she will have conversations with herself -- loud conversations."
Attorney: "So, that's how you know she's angry?"
Bush: "At times, yes, sir."
Attorney: "How else do you know she's angry?"
Bush: "She will tell me she's angry."
Attorney: "Does she yell and scream?"
Bush: "Sometimes."
(Transcript Vol. 9, page 59, line 24 to page 60 line 24).

The Appellant's final witness was a local attorney, Gary Butler, who witnesses' the Appellant exhibiting "bizarre behavior" by "carrying on a fairly loud conversation with herself" in the Courthouse. (Transcript Vol. 9, page 30, line 25 to page 31, line 25).

This portion of the Original Appellant's Brief was included to demonstrate that there was more than one instance of bizarre behavior attested to by the Appellant's witnesses in addition to the prior mental history of the Appellant.

The Court of Appeals, throughout its memorandum opinion, tried to deal with each point of Appellant's evidence separately (citing repeatedly that one example is insufficient to indicate incompetency) and refusing to evaluate all the evidence cumulatively. Additionally, the Court of Appeals complains that the Appellant's attorney failed to file a sworn affidavit regarding her incompetency yet fails to cite any law requiring such an affidavit.

The standard for granting a formal competency is extremely low, "some evidence" from "any source." See **Texas Code of Criminal Procedure Sec. 46B.004(c).** The State failed to put on any witnesses in opposition to the Appellant at the informal competency hearing. The State failed to object to or challenge the credentials of any of the Appellant's witnesses. As a result, there was no evidentiary basis to question the credentials, veracity or basis of knowledge of the Appellant's witnesses. The Court of Appeals appears to have considered all of the Appellant's evidence separately rather that cumulatively, ignoring the total picture of specific issues indicating the incompetency of the Appellant.

The Court of Appeals erred in finding that the evidence requiring a formal hearing on competency was not sufficient.

PRAYER FOR RELIEF

For the foregoing reasons, Petitioner prays that this Court vacate the current judgment and dismiss this case. Or in the alternative, dismiss the current judgment and send this case back to the trial Court with instructions to retry this case pursuant this Court's instructions. The Petitioner also prays for any and all other relief that this Honorable Court deems necessary to a fair and final determination in this case.

Respectfully submitted,

Law Offices of James P. Spencer, II
5023 FM 1632
Woodville, Texas 75979
409-549-6400
Fax 409-837-9779

_____/s/_____
James P. Spencer, II
TBN 17365980
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th DAY of November, 2017, a copy of the foregoing PETITIONER'S BRIEF IN SUPPORT OF DISCRETIONARY REVIEW was served upon all persons and counsel entitled thereto, all in accordance with the Tex.R.App.P., by certified mail, return receipt requested, upon:

Counsel for Appellee:

Sue Korioth, P.C. (Special Prosecutor Assisting the Hardin County DA)
State Bar No. 11691975
P.O. Box 600103
Dallas, Texas 75360

C/O David Sheffield
District Attorney Hardin County
P. O. Box 1409
Kountze, TX 77625
ATTORNEY FOR APPELLEE

_____/s/_____
James P. Spencer, II
Attorney for Appellant
TBN 17365980

CERTIFICATION

I HEREBY CERTIFY that his document complies with the requirements of Tex. R. App. Proc. 9.4(i)(2)(B) because there are 4272 words in this document, excluding the portions of the document excepted from the word count under rule 9(i)(1), as calculated by the MS Word computer program used to prepare it.

_____/s/_____
James P. Spencer, II
Attorney for Appellant
TBN 17365980